specifically referred to in the judgments. In their Lordships' view, it too is without substance. The appellant was old enough to know what excuses, if any, he had for what he had done. No one knew better. All that the rules of natural justice required was that he should be given an opportunity of stating them.

Finally, as respects the report of previous misconduct which came to the attention of the headmaster after the interview of 2nd April and before he had finally decided to expel the appellant, the appellant, at the time this misconduct was discovered, had been given a full opportunity to explain it. It was a straightforward instance of disobedience of the same general kind as that with which he had been taxed at the interview. In their Lordships' view, as the appellant had already been given an opportunity to explain this piece of misconduct at the time that it occurred, there was no obligation upon the headmaster to put it to him again and invite a further explanation.

In relation to such administrative matters as the expulsion of a pupil from a school it would be quite inappropriate to model the procedure on that of a criminal trial. All that natural justice requires is that the person charged with making the decision should act fairly. What is fair depends on the circumstances and is a matter of commonsense. Their Lordships consider that there was no sort of unfairness in the course adopted by the headmaster in relation to the appellant. They will accordingly advise the Head of Malaysia that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Lovell, White & King; Stephenson Harwood & Tatham.*

GOVERNMENT OF MALAYSIA v. LIONEL

[Privy Council (Lord Wilberforce, Viscount Dilhorne, Lord Simon of Glaisdale, Lord Solomon and Sir Gordon Wilmer) November 22, 1973]
[Privy Council Appeal No. 11 of 1972]

Administrative Law — Public servant — Disciplinary action taken under General Orders, Chapter D, reg. 32 for acts of alleged indiscipline — Termination of service by Chief Police Officer after representation — Federal Constitution, arts. 132, 135 & 144.

In this case the respondent had been appointed in 1953 as a temporary clerk/interpreter in the Police Clerical Service. His appointment was on the terms that his engagement would be "terminable at one month's notice or on payment of one month's salary in lieu of notice on either side" and that in so far as they were relevant to the duties of his appointment and to his employment as a public servant, he would "throughout such employment comply with the provisions of the General Orders applicable to his employment within the Federation". In 1962 disciplinary action was taken against him by the Chief Police Officer, Johore, under regulation 32 of the General Orders, Chapter D, for acts of alleged indiscipline. He was required to exculpate himself but his representations were not accepted and the Chief Police Officer informed him by letter that in effect he had failed to exculpate himself and that it had been decided to terminate his services as a temporary clerk. The respondent appealed to the Public Services Commission for reconsideration of his case but his appeal was dismissed. In 1966 the respondent sought a declaration that his purported dismissal by the Chief Police Officer was void, inoperative and of no effect. The High Court dismissed the action but on appeal to the Federal Court, the appeal was allowed and a declaration as sought made ([1971] 2 M.L.J. 172). The Government appealed to the Yang Dipertuan Agung and the appeal was referred to the Privy Council.

Held: (1) members of the general public service obtained a degree of security of tenure under the Constitution of their appointments and it is not correct to say that they were guaranteed security of tenure under Part X of the Constitution;

(2) under the laws of Malaysia a distinction is drawn between dismissal and termination of services and there is nothing in the Constitution which affects the right of the Government to terminate temporary employment in accordance with the terms of the engagement. The Board could not agree with the Federal Court that Regulation 36 of the General Orders was invalid and inconsistent with the Constitution;

(3) the learned trial judge in this case was right in holding that the respondent had not been dismissed but that his services were validly terminated in accordance with the terms of his appointment.

Case referred to:-

(1) *Surinder Singh Kanda* v. *Government of Federation of Malaya* [1962] M.L.J. 169.

PRIVY COUNCIL.

Robert Gatehouse and *Nicholas Lyell* for the appellant.

R. Neville Thomas for the respondent.

Viscount Dilhorne (delivering judgment of the Board): On the 1st October 1953 the respondent was appointed a temporary clerk/interpreter in the Police Clerical Service. His appointment was on the terms that his engagement would be "terminable at one month's notice, or on payment of one month's salary in lieu of notice on either side" and that in so far as they were relevant to the duties of his appointment and to his employment as a public servant, he would "throughout such employment, comply with the provisions of the General Orders applicable to" his "employment with the Federation of Malaya".

On the 30th April 1962 disciplinary proceedings were instituted against him under Regulation 32 of Chapter D of the General Orders issued under the authority of the Yang Dipertuan Agung in accordance with Article 132(2) of the Constitution of the Federation of Malaysia. That Regulation provides that before the Disciplinary Authority imposes any penalty on an officer not on the pensionable establishment who is in Division III or IV of the Public Service, the officer concerned must be given an adequate opportunity to exculpate himself. Regulation 31 states that the "Disciplinary Authority" means in relation to any officer the Commission whose jurisdiction extends to the Service of which such officer is a member in accordance with the provisions of Part X of the Constitution. In relation to the respondent the Disciplinary Authority was the Public Services Commission set up under Article 139(1) of the Constitution. It appears that in fact the disciplinary proceedings were commenced by the Chief Police Officer, Johore Bahru, after, it appears, consultation with the officer of the Public Services Commission who dealt with disciplinary matters.

The respondent was charged with having conducted himself in such a manner as to bring the public service into disrepute and with having been insubordinate on two occasions; and was required to exculpate himself within fourteen days of the receipt of the letter accusing him dated the 30th April 1962, from the Chief Police Officer, Johore Bahru.

He sent an exculpatory letter on the 8th May 1962 and on the 29th May 1962 the Chief Police Officer wrote to him saying:

"... I have to inform you that, after careful consideration of your representations, I have decided that you have failed to exculpate yourself.

2. I have, therefore, decided to terminate your services as a Temporary Clerk with effect from 1st June, 1962, on payment to you of one month's salary plus cost of living allowance in lieu of notice".

The condition precedent, created by Regulation 32, to the imposition of a penalty, namely that he should have an adequate opportunity of exculpating himself, having been satisfied, it was open to the Public Services Commission to impose a penalty on the respondent.

At the time it would seem that the respondent accepted the termination of his employment as having been validly effected for on the 10th June 1962 he appealed to the Public Services Commission for reinstatement. His appeal was rejected and it was three and a half years later that he instituted the proceedings which have culminated in this appeal. In these proceedings he treated the termination of his employment as dismissal and claimed a declaration that it was void and inoperative and of no effect and that he was still a member of the Police Clerical Service, the taking of an account of what was due to him in respect of salary and all emoluments and an order for payment to him of the sum found due to him from the date of his dismissal.

He alleged that it was void on two grounds; first, that it was contrary to Article 144(1) or to Article 144(6) of the Constitution, and, secondly, that it was effected by an authority subordinate to that which at the time of his dismissal had power to appoint a temporary clerk/interpreter in the Police Clerical Service and so was contrary to Article 135(1) of the Constitution.

In its defence the appellant denied that the respondent had been dismissed and asserted that his employment had been terminated in accordance with the terms of his engagement. The appellant also alleged that the action was barred by the Public Authorities Protection Ordinance 1948 section 2, not having been commenced within twelve months of the termination of his employment.

The action was tried by Syed Othman J. on the 13th August 1969. On the 19th January 1971 he gave judgment dismissing the action, holding that the respondent had not been dismissed though in his view he could and should have been as he had failed to exculpate himself, and that the wording of the letter of the 29th May 1962 showed that his services had been terminated. He regarded the fact that the respondent had been given a month's salary plus cost of living allowance as a clear indication of termination in accordance with the terms of his appointment.

The respondent appealed to the Federal Court of Malaysia and on the 9th July 1971 Ong C.J. delivered a judgment with which Gill and Ali F.JJ. concurred, allowing the appeal.

Ong C.J. thought it "only right to say that the wording of the Chief Police Officer's letter should not be the deciding factor". He said that "Calling a spade a pickaxe does not alter the character of that agricultural implement. Even in the same letter it was stated that the decision taken was because the appellant" (now the respondent) "had failed to exculpate himself". He regarded the respondent as having been dismissed and went on to hold that that dismissal was invalid.

To succeed in his action, the first matter the respondent must establish is that he was dismissed. If in fact his employment was terminated in accordance with the terms of his engagement and that could validly be done and did not constitute dismissal, it is unnecessary to consider whether, if he had been dismissed, his dismissal would or would not have complied with the requirements of the Constitution.

Article 132(2) of the Constitution provides that except as otherwise expressly provided by the Constitution the qualifications for appointment and conditions of service of, *inter alios*, persons in the general public service of the Federation may be regulated by federal law and, subject to the provisions of any such law, by the Yang Dipertuan Agung; and Article 132(2A) (added in 1960) provides that except as expressly provided by the Constitution a member of that service holds office during the pleasure of the Yang Dipertuan Agung. The respondent while he held his appointment was a member of the general public service of the Federation and so, except as expressly provided by the Constitution, held office during the pleasure of the Yang Dipertuan Agung.

Article 135(1) of the Constitution provides *inter alia* that no member of the general public service shall be dismissed or reduced in rank by an authority subordinate to that which at the time of the dismissal or reduction has power to appoint a member of the service of equal rank; and Article 135(2) provides that he shall not be dismissed or reduced in rank without being given a reasonable opportunity of being heard. Under Article 144(1) the Public Services Commission has the duty, subject to the provisions of any existing law and of the Constitution, to exercise disciplinary control over, *inter alios*, members of the general public service. Under Article 144(6) it may delegate to any officer of that service or to a board of such officers any of its functions.

So under the provisions of the Constitution, members of the general public service obtained a degree of security of tenure of their appointments. In their Lordships' view it is not correct to say, as Ong C.J. said in the course of his judgment, that they were guaranteed security of tenure under Part X of the Constitution. Although they hold their offices at the pleasure of the Yang di-Pertuan Agong, only the Public Services Commission, or an officer or officers to whom the Commission had validly delegated its functions, could exercise disciplinary control and they cannot be dismissed or reduced in rank save by a person who

could appoint a member of the service of equal rank and without an opportunity of being heard.

Regulation 6 of the General Orders Chapter A reads as follows:

"An officer who has been dismissed from the service or whose services have been terminated on the grounds of unsatisfactory work or conduct may only be re-employed in special and exceptional circumstances."

A distinction is thus drawn between dismissal and termination of services. This Regulation is in that part of the General Orders dealing with appointments and in their Lordships' view was not intended to be and is not a penalty imposed by a Disciplinary Authority on dismissal or by the person who terminates an appointment.

Regulation 33 of Chapter D relates to officers in Divisions I and II and does not apply to the respondent. Regulation 33(e) provides that if on consideration of the officer's reply the Disciplinary Authority is of opinion that he does not deserve to be dismissed but deserves some lesser punishment, it may inflict such lesser penalty by way of fine, reduction of rank or otherwise as may seem to it just. This Regulation thus supports the view that dismissal is a punishment.

Regulation 36 is in the following terms:

"Notwithstanding anything in Regulations 32, 33 and 34 the Government may dispense with the services of any officer or employee not on the pensionable establishment by giving due notice in accordance with the terms of his appointment. In the case of monthly paid officers who have served one year or more in a temporary capacity or are on the permanent non-pensionable establishment, the period of this notice will normally be three months but Government reserves that right to terminate the appointment of an officer not on the pensionable establishment by payment of one month's emoluments in lieu of notice without assigning any reason."

Regulation 48 reads as follows:

"The effect of dismissal is immediate and an officer who is dismissed forfeits all claims to pension, retiring allowance, gratuity, leave or any other benefit to which he might otherwise have been eligible."

Under English law a servant may be summarily dismissed for disobedience to orders or misconduct or may have his employment terminated by notice or the payment of wages in lieu of notice. Under the laws of Malaysia a similar distinction between dismissal and termination of services appears to exist and in their Lordships' opinion there is nothing in the Constitution which affects the right of the Government to terminate temporary employment in accordance with the terms of the engagement. Their Lordships do not agree with Ong C.J. that Regulation 36 is to be regarded as invalid as inconsistent with the Constitution.

Towards the end of his judgment Ong C.J. said:

"That the appellant" (now the respondent) "when accepting appointment in 1953 had expressly agreed to accept one month's notice is no more an answer to his claim than it was to Inspector Kanda."

This was a reference to the case of *Kanda* v. *Government of the Federation of Malaya*[1] where the Commissioner of Police had purported to dismiss Kanda. Before Merdeka Day he had power to do so under Police Ordinance 1952. It was held that since Merdeka Day the Police Service Commission and not the Commissioner had power to appoint and dismiss members of the police service and that his dismissal by the Commissioner was void. In that case there was no agreement that the Inspector's services could be terminated by notice and no question with regard to such termination arose. The only question was, was his dismissal invalid. That case can only be relevant to this case if in fact the respondent was dismissed.

In their Lordships' opinion Syed Othman J. was right to distinguish between dismissal and termination of services in accordance with the terms of the engagement; and right in holding that the respondent had not been dismissed but had had his services validly terminated.

After the respondent had failed to exculpate himself, it was not obligatory to impose a punishment or penalty or to dismiss the respondent. His employment was terminable by one month's salary in lieu of notice and the decision to take that course may well have been due, as Syed Othman J. said, to a desire to save the respondent from the ignominy of dismissal. If he had been dismissed it would have been a breach of Regulation 48 for him to have been paid one month's wages plus cost of living allowance.

As in their Lordships' opinion the respondent was not dismissed, it is not necessary to consider whether, if he had been dismissed on the 29th May 1962, the dismissal would have been valid. It is also not necessary to consider whether the respondent's action was barred by the Public Authorities Protection Ordinance.

In their Lordships' opinion the respondent's employment was validly terminated in accordance with the terms of his appointment. Their Lordships will accordingly report to the Head of Malaysia their opinion that this appeal should be allowed, the order of the Federal Court set aside and the judgment of Syed Othman J. restored and that the respondent should pay the costs of the appeal to the Federal Court and of this appeal.

Appeal allowed.

Solicitors: *Stephenson Harwood & Tatham; Egerton, Sandler, Summer & Co.*